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NO. 90-1842

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

MEREDITH PENN,
Respondent

REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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ARGUMENT

1. THAT THE CIRCUIT COURTS PERCEIVE A NEED TO INVENT A "PARTIAL CLOSURE"/ "SUBSTANTIAL REASON" TEST TO SUPPLEMENT WALLER SHOWS THAT THIS ISSUE SHOULD BE REVISITED.

Respondent claims that Pennsylvania "is requesting that this court apply the standard of substantial reason" invented by certain federal appeals courts (Brief in Opposition, 10). On the contrary, while

Pennsylvania would undoubtedly benefit from such an application, that has never been petitioner's position. Rather, the point is that the "partial closure"/"substantial reason" test is an essentially unworkable accommodation to sixth amendment concerns that are outside the scope of Waller v. Georgia, 467 U.S. 39 (1984). The very fact that several circuits have embraced such an ad hoc standard of review clearly demonstrates that the public trial right of criminal defendants requires explication beyond Waller, which is the sole case on this issue in this Court's history.

The "partial closure"/"substantial reason" standard evolved because, as occurred in this case and in Douglas v. Wainwright, 739 F.2d 531 (11th Cir. 1984), cert. denied, 469 U.S. 1208 (1985), trial judges have reacted decisively to thwart witness intimidation intended to distort testimony, and have not convened formal

hearings to determine facts not in dispute. Where (to borrow respondent's phrase) a court acts to exclude spectators "when the proceedings are being influenced" (Brief in Opposition, 18), a sixth amendment situation "is not reached." United States ex rel. Bruno v. Herold, 408 F.2d 125, 127 (2d Cir. 1969) (emphasis added), cert. denied, 397 U.S. 957 (1970).

As respondent's own brief demonstrates, the partial/total closure expedient analysis of the federal appeals courts is unworkable. Waller is referred to as a "total" closure, yet only the suppression hearing was closed in that case. Respondent refers to Douglas as a "partial" closure, yet the terms of the exclusion order in Douglas are indistinguishable from that in this case, which respondent deems a "total" exclusion.[1] Similarly, respondent

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[1]The trial court in Douglas allowed designated persons to remain, as did the (continued...)

denounces People v. Venters, 124 A.D.2d 57, 511 N.Y.S.2d 283 (1987), as a "sweeping and unlimited" exclusion of the public (Brief in Opposition, 18-20), where the trial court merely locked the courtroom doors during its charge to the jury. Compare State v. Robillard, 146 Vt. 623, 508 A.2d 709 (1986) (locking courtroom doors harmless error because spectators could enter and exit during recesses).

The "partial closure"/"substantial reason" test is an expedient. It was created because in-court witness intimidation in conjunction with the public trial right is a gray area which Waller did not directly address. It should be addressed now.

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[1](...continued)
trial court here, although respondent in fact refused to designate anyone (N.T. 9/10/86, 94).

2. CONTRARY TO RESPONDENT'S ASSERTION, THERE WAS NO FACTUAL DISPUTE WHATEVER THAT THE WITNESS WAS THREATENED.

Respondent additionally labors to insinuate that a factual dispute existed on this issue at trial. This position is simply an invention. At trial, defendant's counsel completely accepted the facts as conveyed by the prosecutor (N.T. 9/10/86, 92-93). Respondent never even asked that the witness be examined on this question.

Respondent's effort to raise a nunc pro tunc factual dispute neatly points out the irrationality of barring a harmless error analysis in every such claim. Convening a hearing to "determine" facts not in dispute would have been pointless, yet the Pennsylvania Superior Court seemed to regard this as the very essence of the trial court's alleged error.[2] That

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[2]While additionally referring to the trial court's supposed failure to consider alternatives, the Superior Court could (continued...)

prejudice must be "presumed" from error which consists of failing to do a pointless act, suggests that the harmless error doctrine should be reconsidered in the instant context.

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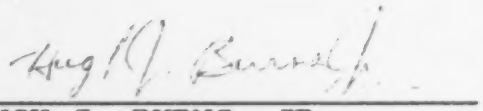
[2](...continued)
suggest no realistic alternative to be considered.

CONCLUSION

For the foregoing reason, petitioner respectfully requests that a writ of certiorari issue.

Respectfully submitted,



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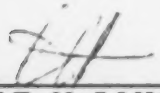

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